Y Jeyamuraly a/l Yesiah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–3 OF 2003
DENIS ONG, MOHD GHAZALI AND JAMES FOONG JJCA
31 MAY 2007

Evidence — Information leading to fact discovered — Admissibility of statement — Statement, meaning of — Whether confined to something that was stated orally or in writing — Whether pointing or nodding or handing over physically an item in response to a question or request were statements within the contemplation of s 37A of the Evidence Act 1950 Act

The appellant was charged with two offences under the Dangerous Drugs Act 1952 ('the Act'). At the end of the trial he was found guilty and convicted on both charges. For the charge of trafficking he was sentenced to death and for the charge of possession he was sentenced to seven years imprisonment with ten strokes. Chief Inspector Haslah bte Bachok ('SP4') from the narcotics department acting on information, led a group of five police personnel to a rubbish dump. Amongst the police personnel was Detective Lance Corporal G Jaganathan a/l R Govindan ('SP6'). Upon arrival, SP4 saw the appellant standing next to some undergrowth with a biscuit tin on the ground next to him. When SP4 and SP6 identified themselves, the appellant looked stunned and immediately attempted to run away but SP6 managed to arrest him and brought him back to the spot where he originally stood. When questioned by SP4 as to whether he understood the Malay language, the appellant nodded his head. SP4 then administered to him the caution under s 37A(1)(b) of the Act. Subsequently, SP4 asked the appellant to hand over any prohibited item in his custody and under his control. In response, the appellant took the said biscuit tin and handed it to SP4. SP4 then opened the lid of the said biscuit tin in the presence of the appellant and saw that it contained 150 plastic packets which were found to contain dangerous drugs. In his defence the appellant stated that his friend by the name of Ponnusamy came and invited him for breakfast at a shop. He obliged. Later Ponnusamy asked him to wait at the place where the incident took place, ie, the rubbish dump. Ponnusamy then left. Whilst waiting, he saw a motorcar stopping and two persons alighted. They then approached him and shouted 'police'. He ran away and managed to hide but they caught him and arrested him. They then brought him to the place where he was waiting for Ponnusamy and asked him why he ran away. He replied that he was scared and that was why he ran away. They then made a search of the place where he was waiting and found a biscuit tin and handed it to him. They then asked him what its contents were and he replied he did not know. After handing back the said biscuit tin to them he was brought to the police headquarters. At the police headquarters he was again asked about the contents of the said biscuit tin and he replied that the contents were not his and that he did not know who the owner was. He claimed he mentioned Ponnusamy's name to the police. There were only two issues in this appeal, viz, whether the conduct of the

A appellant in responding to the question by SP4 amounted to a statement within the meaning of s 37A of the Act or whether it amounted to information leading to discovery under s 27(1) of the Evidence Act 1950.

B **Held**, by majority, setting aside the conviction and sentence on the first charge of trafficking under s 39B(2) of the Act and substituting therefor a conviction under s 12(2) of the Act read together with s 39A(2) of the Act and a sentence of 14 years' imprisonment and ten strokes:

C (1) (per **Mohd Ghazali JCA, Dennis Ong JCA** concuring) The court was of the view that the conduct of the appellant, viz, in picking up the said biscuit tin and handing it to SP4 in response to her request to hand over any prohibited item in his custody or under his control amounts to a statement which fall within the contemplation of s 37A of the Act. The court disagreed with the views of Nik Hashim J as expounded in *Public Prosecutor v Kanapathy a/I Kupusamy & Anor* [2001] 5 MLJ 20 that the word 'statement' appearing in section 37A of the Act was 'confined to something that is stated orally or in writing'. The court was of the view that the word 'statement' appearing in section 37A of the Act must be construed as including actions (see paras 44–45).

D

E (2) (per **Mohd Ghazali JCA, Dennis Ong JCA** concuring) Actions such as pointing or nodding or handing over physically an item in response to a question or request were statements within the contemplation of s 37A of the Act or was tantamount to information received from a person accused of any offence in the custody of a police officer under s 27(1) of the Evidence Act 1950 depending upon the circumstances of the case. Thus that statement was admissible as there was nothing to show that it was caused by any inducement, threat or promise. The appellant, although under arrest, was not handcuffed at that material time. There was nothing to show that he was forced to pick up the said biscuit tin and hand it over to SP4. SP4's evidence on this was not even seriously challenged during the prosecution's case (see para 48).

F

G (3) (per **Mohd Ghazali JCA, Dennis Ong JCA** concuring) The contemporaneous conduct of the appellant in running away when SP4 and SP6 identified themselves as police officers was relevant and admissible by virtue of s 8 of the Evidence Act 1950 under the circumstances of this instant appeal (see para 49).

H (4) (per **Mohd Ghazali JCA, Dennis Ong JCA** concuring) To constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act. The court found no such evidence in this instant appeal. Further, the court could not use the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act as has been decided in *Muhammad bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (see also *Pendakwa Raya v Tan Tatt Eek* [2005] 2 MLJ 685) (see para 55).

I

(5) (per **James Foong JCA** dissenting) It was still necessary for the prosecution to prove to the satisfaction of the court that the appellant was in possession of the illicit drugs contained in the tin. This would include proving that he had

knowledge that its contents were the illicit drugs. The conduct of the appellant in picking up the tin and handing it over to SP4 alone had to be considered together with the question posed by SP4 to him since it arose from the question asked. The question posed by SP4 to the appellant to hand over 'apa-apa barang salah' which he had under this custody and control. But 'apa-apa barang salah' could mean anything that is 'salah'. It might not necessary be in reference to the illicit drugs. It could be anything which was unlawful, such as contraband, pirated or stolen goods. Without specially enquiring about drugs in the question asked then it could not be conclusively inferred from the appellant's conduct in picking up the tin and handing it over to SP4 that he knew that the contents in the tin were the illicit drugs. When more than one inference could be drawn from the response to the question asked then the one which was more favourable to the appellant must be adopted (see *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105 at p 108 and accepted by the Federal Court in *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685) (see para 68).

(6) (per **James Foong JCA** dissenting) Running away from the scene of the crime when confronted by the police before the discovery of the drugs alone could not be inferred that the appellant knew the illicit drugs were in the tin (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). There was the possibility that the appellant reacted in panic in the face of being arrested for possession of something unlawful other than the illicit drugs (see paras 69–70).

[Bahasa Malaysia summary

Perayu telah didakwa atas dua kesalahan di bawah Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir perbicaraan, beliau didapati bersalah dan disabitkan atas kedua-dua kesalahan. Di atas pertuduhan mengedar beliau dijatuhkan hukuman mati dan di atas pertuduhan pemilikan, beliau dihukum penjara tujuh tahun dan sepuluh kali sebatan. Ketua Inspektor Haslah bte Bachok ('SP4') daripada jabatan narkotik telah bertindak atas maklumat yang diterima, mengetuai satu pasukan seramai lima orang polis ke tempat pembuangan sampah. Di antara polis yang hadir adalah Detektif Lans Korporal G Jaganathan a/l R Govindan ('SP6'). Setibanya ke tempat tersebut, SP4 nampak perayu berdiri berhampiran semak dengan satu tin biskut berhampirannya. Apabila SP4 dan SP6 memperkenalkan diri mereka, perayu kelihatan terkejut dan seberapa segera telah cuba melarikan diri tetapi SP6 berjaya menangkapnya dan membawanya balik ke tempat asal dimana perayu berdiri. Apabila disoal oleh SP4 sama ada beliau faham bahasa melayu, perayu mengangguk kepalanya. SP4 kemudiannya memberikan amaran kepadanya di bawah s 37A(1)(b) Akta tersebut. Kemudiannya SP4 telah menyuruh perayu supaya menyerahkan apa-apa barang yang tidak dibenarkan dalam simpanan dan di bawah kawalan beliau. Perayu telah mengambil tin biskut tersebut dan menyerahkannya kepada SP4. SP4 kemudiannya membuka penutup tin biskut tersebut di hadapan perayu dan mendapati bahawa ia mengandungi 150 paket-paket plastik yang didapati mengandungi dadah berbahaya. Dalam pembelaannya perayu menyatakan bahawa kawannya yang bernama Ponnusamy telah datang dan mempelawakannya untuk bersarapan pagi di satu kedai. Beliau mengikut. Seterusnya Ponnusamy

menyuruhnya menunggu di tempat kejadian tersebut, iaitu di tempat pembuangan sampah. Ponnusamy kemudiannya beredar. Semasa menunggu, beliau nampak sebuah kereta berhenti dan dua orang keluar. Mereka kemudiannya menghampirkannya dan menjerit 'polis'. Perayu melarikan diri dan berjaya menyembunyikan diri tetapi mereka dapat menangkap dan menahannya. Mereka kemudiannya membawanya ke tempat di mana beliau sedang menunggu Ponnusamy dan menyoal kenapa beliau melarikan diri. Beliau menjawab bahawa beliau takut dan dengan itu telah melarikan diri. Mereka kemudiannya mencari tempat tersebut dan menjumpai satu biskut tin dan menyerahkan kepadanya. Beliau kemudiannya ditanya apakah kandungan dan menjawab beliau tidak tahu. Selepas memberikan balik tin biskut tersebut kepada mereka, beliau di bawa ke ibu pejabat polis. Di ibu pejabat polis, beliau sekali lagi ditanya kandungan tin biskut tersebut dan dan beliau menjawab bahawa kandungan tersebut bukan kepunyaannya dan beliau tidak tahu siapakah pemiliknya. Beliau menyatakan bahawa nama Ponnusamy diberikan kepada polis. Hanya terdapat dua isu dalam rayuan ini, iaitu, sama ada kelakuan perayu dalam menjawab soalan oleh SP4 merupakan kenyataan dalam maksud s 37A Akta tersebut ataupun ia merupakan maklumat yang membawa kepada penemuan di bawah s 27(1) Akta Keterangan1950.

Diputuskan, mengenepikan sabitan dan hukuman atas pertuduhan pertama bagi pengedaran di bawah s 39B(2) Akta tersebut dan menggantikan baginya satu pensabitan di bawah s 12(2) yang dibaca bersama s 39A(2) Akta tersebut dan satu hukuman penjara selama 14 tahun serta 10 kali sebatan:

(1) (oleh **Mohd Ghazali HMR, Dennis Ong HMR** bersetuju) Mahkamah berpendapat bahawa kelakuan perayu, iaitu, mengambil tin biskut tersebut dan memberikannya kepada SP4 sebagai menjawab permintaannya untuk menyerahkan apa-apa barang salah dalam simpanan dan kawalannya membentuk satu kenyataan yang jatuh dalam maksud s 37A Akta tersebut. Mahkamah ini tidak bersetuju dengan pendapat Nik Hashim H seperti yang diterangkan di dalam kes *Public Prosecutor v Kanapathy a/I Kupusamy & Anor* [2001] 5 MLJ 20 bahawa perkataan 'kenyataan' di s 37A Akta tersebut adalah 'terhad kepada sesuatu yang dinyatakan secara perkataan atau tulisan'. Mahkamah berpendapat bahawa perkataan 'kenyataan' di s 37A Akta tersebut mesti di tafsirkan sebagai termasuk perbuatan (lihat perenggan 44–45).

(2) (oleh **Mohd Ghazali HMR, Dennis Ong HMR** bersetuju) Perbuatan seperti menunjuk atau mengangguk atau menyerahkan secara fizikal satu barangan dalam menjawab kepada satu soalan atau pun permintaan adalah kenyataan dalam maksud s 37A Akta tersebut atau sama seperti maklumat yang diterima daripada seseorang tertuduh terhadap sebarang kesalahan ketika di dalam kawalan seorang anggota polis di bawah s 27(1) Akta Keterangan 1950 bergantung kepada keadaan kes tersebut. Dengan itu kenyataan tersebut boleh diterima oleh kerana tiada apa-apa yang menunjukkan ia dihasilkan melalui sebarang dorongan, ugutan atau janji. Perayu, walaupun di bawah tahanan, tidak digari pada masa yang material tersebut. Tiada apa-apa yang menunjukkan bahawa beliau dipaksa mengambil tin biskut dan menyerahkannya kepada SP4. Keterangan SP4 juga tidak dicabar dengan serius semasa kes pendakwaan (lihat perenggan 48).

(3) (oleh **Mohd Ghazali HMR, Dennis Ong HMR** bersetuju) Semasa keadaan perbuatan perayu dalam melarikan diri apabila SP4 dan SP6 memperkenalkan diri mereka sebagai pegawai polis adalah relevan dan boleh diterima menurut s 8 Akta Keterangan 1950 di bawah keadaan rayuan ini (lihat perenggan 49).

(4) (oleh **Mohd Ghazali HMR, Dennis Ong HMR** bersetuju) Untuk membentuk pengedaran di bawah s 39B(1) Akta tersebut, ianya mesti terdapat mens rea milikan yang diiringi satu tindakan yang lain. Mahkamah tidak menjumpai bukti dalam rayuan ini. selanjutnya, mahkamah tidak dapat menggunakan anggapan milikan di bawah s 37(d) Akta tersebut untuk menggunakan anggapan pengedaran di bawah s 37(da) Akta tersebut seperti yang telah diputuskan di dalam kes *Muhammad bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (lihat juga *Pendakwa Raya v Tan Tatt Eek* [2005] 2 MLJ 685) (lihat perenggan 55).

(5) (oleh **James Foong HMR** menentang) Ianya masih perlu untuk pendakwa raya membuktikan sehingga mahkamah berpuas hati bahawa perayu memiliki dadah haram yang terkandung di dalam tin tersebut. Ini termasuk membuktikan bahawa beliau mempunyai pengetahuan bahawa ianya mengandungi dadah haram tersebut. Perbuatan perayu dalam mengambil tin tersebut dan menyerahkan kepada SP4 dengan sendirinya mesti dipertimbangkan bersama dengan soalan yang ditanya oleh SP4 oleh kerana ia berbangkit daripada soalan tersebut. Soalan yang ditanya oleh SP4 kepada perayu untuk menyerahkan 'apa-apa barang salah' dalam simpanan dan kawalan beliau. Akan tetapi 'apa-apa barang salah' boleh bermaksud apa-apa yang 'salah'. Ia mungkin tidak berkaitan dengan dadah haram tersebut. Ia boleh bermaksud apa-apa sahaja yang diharamkan, seperti kontraban, barangan tiruan atau dicuri. Tanpa bertanya secara khusus tentang dadah tersebut di dalam soalan yang ditanya maka ia tidak dapat secara konklusif disimpulkan daripada perbuatan perayu dalam mengambil tin tersebut dan menyerahkannya kepada SP4 bahawa beliau mempunyai pengetahuan akan kandungan di dalam tin tersebut adalah dadah haram. Apabila terdapat lebih daripada satu inferens yang dapat diambil daripada jawapan terhadap soalan tersebut maka yang mana lebih memihak kepada perayu mesti dipakai (lihat *Tai Chai Keh v Public Prosecutor* [1948-49] MLJ Supp 105 di ms 108 dan diterima oleh Mahkamah Persekutuan di *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685) (lihat perenggan 68).

(6) (oleh **James Foong HMR** menentang) Melarikan diri daripada tempat kejadian apabila dicabar polis sebelum penemuan dadah tersebut dengan sendirinya tidak boleh disimpulkan bahawa perayu mempunyai pengetahuan dadah haram tersebut di dalam tin (lihat *Abdullah Zawawi bin Yusoffv v Public Prosecutor* [1993] 3 MLJ 1). Terdapat kemungkinan bahawa perayu bertindak disebabkan panik apabila berhadapan dengan kemungkinan ditahan untuk milikan sesuatu yang menyalahi undang-undang selain daripada dadah haram tersebut (lihat perenggan 69–70).]

Notes

For cases on admissibility of statement, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1799–1804.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Choo Yoke Chov v PP [1992] 2 MLJ 632 (refd)
Hasamuddin Talena v PP [2002] 2 MLJ 408 (refd)
Lim Kaw Wan v PP [1985] CLJ (Rep) 530 (refd)
Muhammad bin Hassan v PP [1998] 2 MLJ 273 (folld)
Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)
PP v Kanapathy a/l Kupusamy & Anor [2001] 5 MLJ 20 (not folld)
PP v Khoo Boo Hock & Anor [1990] 2 CLJ 716 (refd)
PP v Tan Kim Piow [2006] 5 MLJ 409 (refd)
PP v Tan Tatt Eek [2005] 2 MLJ 685 (refd)
Tai Chai Keh v PP [1948-49] MLJ Supp 105 (refd)

Legislation referred to

Criminal Procedure Code s 113
Dangerous Drugs Act 1952 ss 12(2), 37(d), 37A, 37A(1)(a), (b), 39A(2), 39B(1)(a), (2)
Evidence Act 1950 ss 8, 27(1)

Gobind Singh Deo (Karpal Singh & Co) for the appellant.
Nurulhuda Nur'aini Mohd Noor (Deputy Public Prosecutor) for the respondent.

Mohd Ghazali JCA (delivering majority judgment):

[1] This is the majority judgment of the court. The appellant was charged with two offences in the High Court, Kuala Lumpur under the Dangerous Drugs Act 1952 ('the Act'), namely:

(i) an offence of trafficking dangerous drugs under s 39B(1)(a) of the Act, to wit, 20.1g of monoacetylmorphine and punishable under s 39B(2) of the same; and

(ii) an offence of being in possession of dangerous drugs under s 12(2) of the Act, to wit, 9.5g of a mixture of heroin and monoacetylmorphine (7.1g heroin and 2.4g monoacetylmorphine) and punishable under s 39A(2) of the same

[2] At the end of the trial he was found guilty and convicted on both charges. For the charge of trafficking he was sentenced to death and for the charge of possession he was sentenced to seven years imprisonment with ten strokes. The appellant appealed.

[3] In a majority judgment, my brother Denis Ong JCA and myself allowed the appeal in relation to the first charge, namely, that based on the evidence we were satisfied that the charge of trafficking cannot stand. We accordingly set aside the conviction and sentence on that charge. However, we found that there was ample evidence to establish that the appellant was in custody and control of the dangerous drugs in question giving rise to the presumption under s 37(d) of the Act. We accordingly convicted the appellant on a substituted charge of possession under s 12(2) of the Act read together with s 39A(2) of the same and after hearing his

mitigation plea, sentenced him to 14 years imprisonment and imposed 10 strokes. As regards the second charge of possession we agreed with the learned trial judge and hence affirmed the conviction and sentence imposed. We also ordered that the sentences are to run concurrently to take effect from the date of arrest. Our learned brother James Foong JCA was of the dissenting view that the appeal against both charges be allowed and conviction and sentence set aside. Our reasons now follow.

THE PROSECUTION'S CASE

[4] The facts of the case are as follows. On 11 June 2001 at about 2.15pm, Chief Inspector Haslah bte Bachok (SP4) from the Narcotics Department, Police Contingent Headquarters, Kuala Lumpur acting on information led a group of five police personnel to a rubbish dump situated in Jinjang Utara, Sentul, Kuala Lumpur. Amongst the police personnel was Detective Lance Corporal G Jaganathan a/l R Govindan (SP6).

[5] Upon arrival, SP4 saw the appellant standing next to some undergrowth. She noticed a biscuit tin (exh P12) on the ground next to the right leg of the appellant. SP4 and SP6 consequently approached the appellant and identified themselves and SP4 showed her police authority card. The appellant looked stunned and immediately attempted to run away. SP6 grappled with him and arrested him about two metres from the spot where he (the appellant) had been standing. SP6 then brought the appellant to the spot where he was standing when they first approached him.

[6] When questioned by SP4 as to whether he understood the Malay language, the appellant nodded his head. SP4 then administered to him the caution under s 37A(1)(b) of the Act and consequently explained to him that he has a right not to say anything and that anything he say may be given in evidence. The caution under the said s 37A(1)(b) read:

> lt is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

[7] Subsequently, SP4 asked the appellant to hand over any prohibited item in his custody and under his control. In response, the appellant took the said biscuit tin (exh P12) and handed it to SP4. SP4 then opened the lid of the said biscuit tin in the presence of the appellant and saw that it contained the following:

(a) 100 transparent plastic packets tied into bundles of ten and each packet containing yellowish granular and powdery substance which SP4 believed was heroin;

(b) 50 transparent plastic packets tied into bundles often and each containing dull coloured granular and powdery substance which SP4 also believed to be heroin.

[8] In the course of investigations, the 150 plastic packets containing the granular and powdery substance were sent to SP3, a chemist with the Chemistry Department,

Petaling Jaya who conducted an analysis. He found that the 100 transparent plastic packets tied into bundles of ten each containing the yellowish granular and powdery substance was 20.1g of monoacetylmorphine and the 50 transparent plastic packets tied into bundles often and each containing dull-coloured granular and powdery substance was 2.4g of monoacetylmorphine and 7.1g of heroin.

[9] The appellant was subsequently charged with the said two offences under the Act, namely, an offence of trafficking dangerous drugs under s 39B(1)(a) of the Act, viz, 20.1g of monoacetylmorphine and an offence of being in possession of dangerous drugs under s 12(2) of the Act, viz, 9.5g of a mixture of heroin and monoacetylmorphine (7.1g heroin and 2.4 grammes monoacetylmorphine) and punishable under s 39A(2) of the same.

[10] In the course of the trial, whilst SP4 was giving evidence in relation to what transpired after she had administered the caution under s 37A(1)(b) of the Act to the appellant, learned counsel for the appellant insisted that a trial within a trial be held on the ground that what transpired after the caution was administered was not voluntary. The learned deputy public prosecutor did not object to this. The learned trial judge decided to hold the trial within a trial to determine the voluntariness of any statement made by the appellant or any act of the appellant.

TRIAL WITHIN A TRIAL

[11] In the course of the trial within a trial, SP4 testified that after explaining the caution under s 37A(1)(a) of the Act to the appellant, she asked the appellant to hand over to her any prohibited item in his custody and under his control. This was what SP4 said:

> Selepas saya terangkan dan jelaskan tentang amaran yang telah saya bacakan saya minta orang kena tuduh serahkan apa-apa barang salah dalam simpanan dan kawalan beliau.
>
> Orang kena tuduh telah mengambil satu tin dan serahkan kepada saya. Di sepanjang waktu ini D/L/Kpl Jeganathan berada bersama-sama saya.
>
> Saya tidak ada pukul orang kena tuduh pada bila-bila masa. Saya tidak memberi sebarang janji kepada orang kena tuduh pada bila-bila masa. Saya tidak mengugut atau mendorong orang kena tuduh untuk menyerahkan apa-apa barang kepada saya. Dari tempoh masa orang kena tuduh ditangkap oleh D/L/Kpl Jeganathan sehingga waktu orang kena tuduh menyerahkan tin itu kepada saya, saya tidak nampak D/L/Kpl Jeganathan mengugut atau mendorong orang kena tuduh untuk menyerahkan apa-apa barang salah kepada saya. Saya tidak dengar D/L/Kpl Jeganathan menjanjikan apa-apa kepada orang kena tuduh.
>
> Saya tidak nampak D/L/Kpl Jeganathan memukul orang kena tuduh. Hanya ada pergelutan semasa melaksanakan tangkapan. Di tempoh masa di antara orang kena tuduh ditangkap dan dia menyerahkan tin itu kepada saya ialah lebih kurang 2 hingga 3 minit.
>
> Apabila saya buka tin tersebut saya dapati dalam tin tersebut mengandungi 10 ikatan paket-paket plastik lutsinar di mana setiap ikatan mengandungi sepuluh paket lutsinar berisi serbukdan ketulan warna kuning disyaki sebagai dadah heroin dan 5 ikatan paket-paket

plastik lutsinar di mana setiap satu ikatan mengandungi 10 packet lutsinar berisi serbuk dan ketul warna kelabu yang disyaki sebagai dadah heroin.

[12] SP4 further stated when she administered the caution to the appellant the latter was not handcuffed. It was only when she discovered the dangerous drugs in the said biscuit tin that she ordered SP6 to handcuff the appellant.

[13] In the course of the trial within a trial, learned counsel for the defence did not put the appellant on the witness stand but requested that he be allowed to cross-examine SP6.

[14] In his evidence during the trial within a trial, SP6 said he also identified himself to the appellant when he first approached him together with SP4. He chased and arrested the appellant when he ran away after they had identified themselves. He also said he noticed the said biscuit tin on the ground next to where the appellant was standing when he first approached him. He further stated that when SP4 asked the appellant whether he understood the Malay language the appellant replied 'Saya faham'. He agreed that when SP4 asked the appellant whether he had with him anything illegal the appellant took the said biscuit tin and handed it over to SP4. In relation to this, the transcript of the learned trial judge read as follow:

Soalan: Bila kamu bawa orang kena tuduh kepada Inspektor Haslah apa berlaku.

Jawapan: Inspektor Haslah telah tanya orang kena tuduh sama ada dia boleh faham atau tidak Bahasa Melayu. Orang kena tuduh menyatakan boleh faham.

Soalan: Apakah perkataan sebenar yang digunakan oleh orang kena tuduh.

Jawapan: Saya faham.

Soalan: Lepas itu apa berlaku.

Jawapan: Inspektor Haslah telah menyoal dalam Bahasa Malaysia kepada saspek. Selepas itu saspek telah mengambil satu tin dan menyerahkan kepada Inspektor Haslah.

[15] At the end of the trial within a trial, the learned trial judge ruled that the evidence of SP4 and SP6 was admissible. He said:

Mahkamah memutuskan bahawa keterangan mengenai SPTWT1 memberikan amaran kepada orang kena tuduh, selepas itu menjelaskan amaran (yang telah dibacakan olehnya kepada orang kena tuduh), selepas itu meminta orang kena tuduh serahkan kepadanya apa-apa barang salah dalam kawalan dan simpanan orang kena tuduh yang disusuli oleh perbuatan orang kena tuduh mengambil satu tin dan serahkan kepada SPTWT1 adalah boleh diterima masuk dalam keterangan.

[16] In the course of the trial, SP6 testified that when SP4 asked the appellant whether he understood the Malay language, the appellant nodded his head. He said:

Selepas bawa kepada C/Insp Haslah, C/Insp Haslah telah menyoal orang kena tuduh boleh dia bercakap dalam Bahasa Malaysia. Orang kena tuduh menganggukkan kepalanya. Kemudian C/Insp Haslah telah memberi amaran dan menyoal lelaki India itu dalam Bahasa Malaysia ada apa-apa barang salah. Orang kena tuduh menganggokkan kepada dan ambil satu tin dari atas tanah dan serah kepada C/Insp Haslah.

Semasa orang kena tuduh mula-mula lari, ada satu tin di sebelah kaki kanannya. Tin itulah yang diambil oleh orang kena tuduh dan diserahkan kepada C/Insp Haslah.

Bila saya kata C/Insp Haslah memberi amaran, maksud saya C/Insp Haslah telah membaca kata-kata amaran. Saya tidak ingat kata-kata amaran tersebut, Tetapi saya pasti bahawa apa yang dibaca itu adalah kata-kata amaran.

[17] At the close of the case for the prosecution, the learned trial judge found that the prosecution had made out a *prima facie* case against the appellant on both charges and hence called upon the appellant to enter on his defence.

THE DEFENCE CASE

[18] The appellant elected to give evidence on oath. In his defence the appellant stated that on the morning of the day of the incident, while asleep in his house, his friend by the name of Ponnusamy came and woke him up and invited him for breakfast at a shop. He obliged. Later Ponnusamy asked him to wait at the place where the incident took place, ie, the rubbish dump. Ponnusamy then left. Whilst waiting, he saw a motorcar stopping and two persons alighted. They then approached him and shouted 'police'. He ran away and managed to hide but they caught him and arrested him. They then brought him to the place where he was waiting for Ponnusamy and asked him why he ran away. He replied that he was scared and that was why he ran away. They then made a search of the place where he was waiting and found a biscuit tin and handed it to him. They then asked him what were its contents and he replied he did not know. After handing back the said biscuit tin to them he was brought to the Police Headquarters Kuala Lumpur.

[19] At the Police Headquarters he was again asked about the contents of the said biscuit tin and he replied that the contents were not his and that he did not know who the owner was. He claimed he mentioned Ponnusamy's name to the police.

[20] Under cross-examination, the appellant admitted that the place where the incident took place was a rubbish dump. He denied that the said biscuit tin was on the ground next to him when SP4 and SP6 approached him. He also insisted that it were SP4 and SP6 who found the said biscuit tin and they asked him to carry the said biscuit tin.

[21] In examination-in-chief, the appellant admitted that he gave a cautioned statement to the police under s 37A of the Act but insisted that the police never recorded what he said. He also claimed he did not know how to read.

[22] In her evidence, SD3 claimed that the appellant was her adopted brother. She stated that on 14 October 2002 she visited the appellant whilst he was in prison and was informed by him that one Ponnusamy a/l Ramasamy was also involved in the case. She then made a police report on 18 October 2002. She also made another police report on 8 January 2003 upon being informed that the said Ponnusamy's family was residing in Jalan Masjid, Parit 4, Sg Burung, Sekinchan. She insisted that she first met the said Ponnusamy sometime in the year 2001. Evidence was adduced at the trial to show that the defence made some attempts to serve a subpoena on the said Ponnusamy but could not trace him.

[23] At the conclusion of the trial, the learned trial judge, after considering all the evidence adduced before him, found that the appellant failed to cast a reasonable doubt and concluded that the prosecution has proved its case beyond reasonable doubt and accordingly found him guilty and convicted him on both charges. In relation to the offence of trafficking in the said dangerous drugs under s 39B(2) of the Act, the appellant was sentenced to death and in relation to the offence under s 12(2) of the Act read together with s 39A(2) of the same, he was sentenced to seven years imprisonment with 10 strokes. The appellant appealed against both conviction and sentence.

THE APPEAL

[24] Before us, learned counsel for the appellant submitted that the crux of the prosecution case lies in the evidence of SP4. She, together with SP6 had approached the appellant at the rubbish dump and identified herself and showed her authority card. The appellant then ran away and was arrested by PW6 after a short chase and was brought back to the place where he originally stood when approached. SP4 then administered the caution after asking him whether he understood the Malay language whereupon the appellant nodded. SP4 then asked the appellant to hand over any prohibited item in his custody or under his control whereupon the appellant picked up the said biscuit tin near where he stood and handed it to SP4. Upon inspection, SP4 found that the said biscuit tin contained plastic packets suspected to contain heroin.

[25] Learned counsel then argued that there are only two issues which call for consideration in this appeal, namely:

(i) whether the conduct of the appellant amounts to a statement within the meaning of s 37A of the Act; and

(ii) whether the prosecution has successfully proved the question that SP4 asked the appellant and the appellant's answer, which now amounts to either a statement under s 37A of the Act or information leading to discovery under s 27(1) of the Evidence Act 1950.

[26] Learned counsel pointed out that the learned trial judge ordered a trial within a trial to determine whether the conduct of the appellant in picking up and handing over the said biscuit tin to SP4 was admissible. At the end of the trial within a trial

A he ruled that he was satisfied that appellant was properly cautioned and had voluntarily picked up the said biscuit tin and handed it to SP4.

[27] The learned trial judge however expressed doubts in his judgment later as to whether the said conduct of the appellant amounted to a 'statement' within the B meaning of s 37A of the Act. He said he was more inclined to accept that the conduct of the appellant did not amount to a 'statement' within the meaning of the section and consequently opined that the conduct of the appellant was more relevant under s 27(1) of the Evidence Act 1950 and that in the event he was wrong in his ruling aforesaid, and it is held that the conduct of the appellant did amount to a 'statement' under s 37A of the Act, he was satisfied that SP4 had properly administered the C caution to the appellant prior to asking the question as to whether he had any prohibited item in his custody or under his control. He also ruled that he was satisfied that the conduct of the appellant was voluntary.

[28] After referring to several authorities, learned counsel submitted that where any D act of an accused communicates a fact to the officer asking the question, such conduct must necessarily amount to a statement by the accused within the meaning of s 37A of the Act. If this were not the case, then persons who cannot write, in other words, an illiterate and persons who are mute will automatically be excluded from the protection afforded by the section. This certainly cannot be what Parliament had intended when the said section was drafted. The intent and purport of s 37A of the E Act is to, amongst others, re-emphasize the fact that persons arrested have the right to remain silent and that they need not answer any questions after arrest.

[29] Learned counsel then pointed out that in the instant appeal the prosecution has failed to successfully prove the question asked by SP4 and the answer made by F the appellant and hence submitted that efforts on the part of the prosecution to admit the statement, be it under s 37A of the Act or as information leading to discovery under s 27(1) of the Evidence Act 1950, must fail. He then highlighted the contradictions in the evidence of SP4 and SP6 during the trial within a trial which according to him is as follows:

G (i) In her evidence, SP4 testified that she asked the appellant to hand over any prohibited item in his custody or under his control.

(ii) SP6, who at all material times was together with SP4 testified that as far as he could remember, SP4 asked the appellant whether there was any prohibited item which is kept or hidden. The transcript of the learned trial judge on this H part of SP6's testimony during re-examination during the course of the trial within a trial read:

> Soalan: Ada Insp. Haslah bercakap apa-apa dengan orang kena tuduh pada ketika itu.
>
> I Jawapan: Yang saya ingat Inspektor Haslah menanya orang kena tuduh adakah apa-apa barang salah yang tersimpan atau tersorok. Semasa Inspektor Haslah tanya ini, saya ada bersama-sama saspek.
>
> Soalan: Sebelum dia tanya adakah apa-apa barang salah yang tersimpan atau tersorok, ada Inspektor Haslah cakap apa-apa kepada orang kena tuduh?

Jawapan: Tidak.

Soalan: Semasa orang kena tuduh ambil satu tin dan serah kepada Inspektor Haslah adakah orang kena tuduh cakap apa-apa kepada Inspektor Haslah.

Jawapan: Tidak.

[30] Learned counsel then argued that mere knowledge of the dangerous drugs cannot constitute proof of possession. He then referred to *Choo Yoke Chov v Public Prosecutor* [1992] 2 MLJ 632 where Anuar J in delivering the judgment of the Supreme Court said (at p 639):

> It is trite law that mere knowledge is not sufficient to constitute possession: see *PP v Lai Ah Bee* [1974] 2 MLJ 74, followed by Edgar Joseph Jr J in *PP v Khoo Boo Hock & Anor* [1990] 1 CLJ 971 at p 975. It is merely one of the ingredients of possession. Without the evidence of custody or control, the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 cannot arise.

[31] Premised upon the above authority, learned counsel submitted that before the prosecution can ask that a statement or information given by an accused be admitted in evidence, the prosecution must prove beyond reasonable doubt the actual statement or information given by the accused. If there are conflicting versions of what was said, which conflict go to the root of the statement or information, affecting its meaning, the court ought to rule the same inadmissible on that score alone.

[32] In furtherance of the above argument, learned counsel referred to *Hasamuddin Talena v Public Prosecutor* [2002] 2 MLJ 408 where Gopal Sri Ram JCA speaking on behalf of this court said (at p 410):

> It is settled beyond argument that where the prosecution seeks to rely on information under the inclusionary provisions of s 27 of the Evidence Act 1950, approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng vPP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, where Abdul Hamid Omar LP reminded us of the need for vigilance, 'to ensure the credibility of evidence by the police personnel in respect of this section, (that is, s 27) which is so vulnerable to abuse.
>
> The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Birch v PP* [1978] 1 MLJ 72. This is what he said:
>
> > Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery, in this case the act of the appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd Desa's guilt still remain uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.

Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and recorded in the language or words used by the accused.

The strictness of the rule in the application appears sufficiently from the following passage in *Sarkaron Evidence* (14th Ed) at p 492:

> Statements made by accused to police officers which are or may be provable under s 27 should be clearly and carefully recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (In *Re Athappa Goundan* AIR [1937] Mad 618; *Re Ramamurthy* AIR [1941] M 290; *Naresh v R* 46 CWN 180; *Public Prosecutor v Pasala* AIR [1945] Mad 2021; *Public Prosecutor v Venkoba* [1937] MWN 73; *Chenna v King Emperor* AIR [1940] Mad 710; *Gaya v State* AIR [1957] All 459; *Nathuv State* AIR [1958] All 46). No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the accused.

We have addressed our minds to the question whether the strict test has been met by the facts of the present appeal. After anxious consideration we hold that it has not. The danger of abuse to which the Lord President referred in *Pang Chee Meng* appears to apply plumb to the present facts. These observations then lead us to the logical conclusion that the conviction in the present case is entirely unsafe. The learned deputy who argued this appeal has with customary frankness conceded that the entire prosecution's case rest on these supposed pieces of information leading to discovery. Once they fall, so must the prosecution's case.

[33] Learned counsel concluded his submission by pointing out that from the evidence of SP4 and SP6, two different questions were asked and this in itself demolishes the prosecution's case as the doubt in respect of the actual question itself must go in favour of the appellant. He then submitted that where there is a doubt in the statement or information intended to be communicated by the appellant to the police then neither will s 37A of the Act nor s 27(1) of the Evidence Act 1950 apply and so the statement or information must be rejected and as the case for the prosecution rests primarily on this evidence alone, this court should allow this appeal and set aside the convictions and acquit and discharge the appellant herein.

[34] In opposing the appeal the learned deputy public prosecutor submitted that the facts showed that the appellant was in possession of the said biscuit tin and its contents. As to what is the meaning of possession, she referred to *Chan Pean Leon v Public Prosecutor* [1956] 22 MLJ 237 at p 239 where Thomson J said:

> In my experience there is no question which magistrates find more difficult to deal with than this question of what amounts to 'possession' for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed.

'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) p 304:

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on the table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also I frequently used by other people then the mere fact I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. It is true that in prosecutions under the Dangerous Drugs Ordinance a lack of evidence in this connection may be made good by the statutory presumptions contained in that Ordinance. But there are no such presumptions in Common Gaming Houses Ordinance nor are any such presumptions in relation to possession of stolen property.

Once possession is proved then before the accused person can be convicted it is necessary in addition to prove mens rea. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v Rex*, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in Ton's case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in Lee's case, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[35] The learned deputy public prosecutor agreed that close proximity alone is not sufficient to prove possession, as expounded in the above case, but proximity coupled with other evidence to show that the appellant had the requisite intention to deal with it as owner, is possession. This intention is by way of inference.

[36] She then summarised the evidence of possession in the instant case to be as follows:

(i) the appellant was in a very close proximity with the said biscuit tin containing the said dangerous drugs;

(ii) no other person was seen at the scene;

(iii) the place was a rubbish dump and full of bushes;

(iv) the appellant was standing 30 meters into the rubbish dump;

(v) the said dangerous drugs being a valuable thing, it is highly improbable that it had been left there for someone else to discover it.

[37] On inference of knowledge, she referred to the conduct of the appellant of running away when SP4 identified herself and produced her authority card. She pointed out that the act of running away was even before the said dangerous drugs were found. She then argued the only reasonable inference is that the appellant had prior knowledge as to the existence of the said dangerous drugs in the said biscuit tin.

[38] In relation to act of the appellant picking up the said biscuit tin and handing it to SP4, the learned deputy public prosecutor argued that this act is relevant as conduct under s 8 of the Evidence Act 1950 and is not subject to s 37A of the Act as it is not a statement. On this argument, she referred to *Public Prosecutor v Kanapathy a/I Kupusamy & Anor* [2001] 5 MLJ 20 where Nik Hashim J (as he then was) said (at p 27):

> On my part, since the word 'statement' in ss 37A of the Act and s 113 of the CPC has not been defined, I feel the dictionary meaning of 'something that is stated' should be given to it (see *Sarkar on Evidence* (15th Ed, 1999) at p 2279; *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106 at p 107). The usage of the words such as 'is oral or in writing', 'in answer to questions', 'in the hearing of, 'interpreted', 'to say' 'to answer', 'you say' and 'shall not be bound to answer any question' in s 37Aas emphasized above, clearly indicate that the word 'statement' therein is confined to something that is stated orally or in writing. To hold that the conduct of OKT 1 in this case amounts to a statement under s 37A would be, in my view, to overstretch the language beyond its common usage. Therefore, I hold that OKT1's conduct in leading the police and retrieving the drugs in the room is not an answer to the question and hence it is not a statement under s 37A of the Act or under s 113 of the CPC.

[39] The learned deputy public prosecutor then argued that alternatively, if that conduct of the appellant amounts to a statement, the statement is admissible under s 37A of the Act as the caution had been administered and explained to appellant. With regard to this, she referred to the learned trial judge's transcript as to what SP4 said at the trial within a trial (pp 44-46 of the appeal record):

> Selepas selesai tangkapan, orang kena tuduh telah dibawa ke hadapan saya dan saya lalu bertanya kepada orang kena tuduh adakah beliau boleh berbahasa Malaysia. Orang kena tuduh mengganggukkan kepalanya dan saya lalu bacakan kata-kata beramaran di bawah s 37A(l)(b) Akta Dadah Berbahaya 1952 dalam Bahasa Malaysia dan minta orang kena tuduh serahkan kepada saya apa-apa barang salah dalam simpanan dan kawalan beliau.

Lelaki India tersebut telah serahkan kepada saya satu tin biskut bertulis JACOB & COS CREAM CRACKERS. Saya ambil dan buka penutup tin berkenaan.

Saya boleh ingat amaran yang saya bacakan: 'Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soaian tetapi apa-apa jua yang kamu nyatakan sama ada sebagai menjawab kepada suatu soaian atau tidak boleh diberi sebagai keterangan.'

Saya tidak catitkan di mana-mana amaran yang saya bacakan itu. Selepas amaran dibacakan saya ada jelaskan kepada orang kena tuduh tentang hak-hak beliau untuk berdiam diri dan apa-apa jua yang orang kena tuduh katakan boleh diberi sebagai bukti.

Selepas saya terangkan dan jelaskan tentang amaran yang telah saya bacakan saya minta orang kena tuduh serahkan kepada saya apa-apa barang salah dalam simpanan dan kawalan beliau.

Timbalan Pendakwa Raya: Apa reaksi orang kena tuduh bila kamu membuat permintaan itu?

Orang kena tuduh telah mengambil satu tin dan serahkan kepada saya. Di sepanjang waktu ini D/L/Kpl Jeganathan berada bersama-sama saya.

[40] The learned deputy public prosecutor pointed out that the evidence of SP4 in this respect was confirmed by the evidence of SP6. She also pointed out that the appellant did not give evidence and therefore what operated in his mind at the time he handed the said biscuit tin to SP4 was not known and hence, in the absence of contrary evidence the trial judge was right to admit this evidence to show knowledge, the prosecution having proven that there was no threat, promise or inducement and the statutory caution was read and explained to the appellant.

[41] In relation to the defence case the learned deputy public prosecutor submitted that the defence is one of bare denial. With regards to the said Ponnusamy, she argued that even though Ponnusamy exist, it is not the appellant's defence that the said biscuit tin and its contents belongs to Ponnusamy. SD3, the appellant's adopted sister testified that what the appellant told her was that one Ponnusamy was involved in this case but there was no evidence or even a suggestion that Ponnusamy had left the said biscuit tin containing the said dangerous drugs with the appellant at the rubbish dump.

[42] In conclusion, the learned deputy public prosecutor submitted that the learned trial judge was correct in ruling that the defence evidence had not raised any reasonable doubt and that the appellant had failed to rebut the presumption of trafficking on a balance of probabilities. She prayed that the conviction and sentence be affirmed on both charges.

THE MAJORITY JUDGMENT OF THE COURT

[43] We would agree with learned counsel for the defence that there are only two issues in this appeal, viz., whether the conduct of the appellant in responding to the

question by SP4 amounts to a statement within the meaning of s 37A of the Act or whether it amounts to information leading to discovery under s 27(1) of the Evidence Act 1950.

[44] We are of the view that the conduct of the appellant, viz., in picking up the said biscuit tin and handing it to SP4 in response to her request to hand over any prohibited item in his custody or under his control amounts to a statement which fall within the contemplation of s 37A of the Act.

[45] We do not agree with the views of Nik Hashim J as expounded in *Public Prosecutor v Kanapathy a/I Kupusamy & Anor* that the word 'statement' appearing in s 37A of the Act is 'confined to something that is stated orally or in writing'. We are of the view that the word 'statement' appearing in s 37A of the Act must be construed as including actions.

[46] *Lim Kaw Wan v Public Prosecutor* [1985] CLJ (Rep) 530 is a case on point. The facts of that case as elucidated by Edgar Joseph Jr J (as he then was) in his judgment is as follows (at p 531):

> On the afternoon of 23 September 1981, a man was seen about to enter a Toyota Corolla car parked at the FIMA Supermarket car park and drive it away — in point of fact, he had already opened the door, had one foot in the car, a hand on the steering wheel and the ignition key in place, when he was set upon by three police officers attached to the Anti-Narcotics Department namely PW1, PW2 and PW3 who obviously had been lying in wait either for him or his car — which, it is not clear. He was immediately placed under arrest and handcuffed. That man was the appellant. A search of the boot of his car followed in his presence but nothing incriminating was found. At this point, according to PW2, the appellant who had not been cautioned said: 'Don't waste your time' and nodded with head towards the front passenger seat, saying, at the same time 'That's the stuff'.
>
> PW2 then conducted a further search of the front passenger seat area and recovered from its footwell, two envelopes, in which were plastic packets containing a substance later certified by the Government chemist to be 269.01 grammes of heroin, a dangerous drug within the meaning s. 2 of the Dangerous Drugs, 1952 ('the Act').
>
> Later, the same day, the appellant led a party of police officers headed by PW3 to his house and, from a room there, which the appellant had been sharing with his sister, recovered from a dressing table, an envelope which subsequent analysis by the chemist revealed was contaminated with heroin. Also recovered from this dressing table, were the appellant's Restricted Passport and National Registration of Identity Card.

[47] The facts referred to above in that case shows that the appellant was under arrest at the material time but the caution had yet to be administered to him as opposed to the facts in the instant appeal. Be that as it may, in dealing with the issue as to whether the action of the appellant nodding his head towards the front passenger seat formed part of his statement vis a vis s 37A of the Act or whether is tantamount to giving information which distinctly related to the discovery of the offending exhibits under s 27(1) of the Evidence Act 1950, Edgar Joseph Jr J said (at pp 354–535):

This brings me to a consideration of evidence of verbal statements and actions by the appellant at or about the time of his arrest which I had adverted to when discussing the case for the prosecution and which the learned President held to be inadmissible by reason of the omission on the part of the arresting officers to caution the accused under the provisions of proviso (b) to s 37A(1) of the Act.

Now, s 27(1) of the Evidence Act 1950 provides as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

It has been held, and I agree, that this provision is quite separate from and complementary to proviso (b) to s 113(1) of the Criminal Procedure Code (which is in pari materia with proviso (b) to s 37A(1) of the Act), see *Public Prosecutor v Toh Ah Keat* [1977] 2 MLJ 89 per Hashim Yeop Sani J (as he then was) and *Public Prosecutor v Sandra Margaret Birch* [1977] 1 MLJ 129 per Arulanandom J.

It is indisputable that at the material time the appellant was an accused and in custody so that the only question for consideration is whether he had given information which distinctly related to the discovery of the offending exhibits.

What the appellant said just before he nodded his head namely 'Don't waste your time' and immediately after 'That's the stuff' were all so inextricably interwoven that both verbal statements and the action of nodding had to be admitted in order to understand what the appellant had intended to convey.

The appellant's action of nodding was part of his statement, see *Lee Lian & Ors v Public Prosecutor* [1956] MLJ 191 where Thomson J (as he then was) held that 'statements must be construed as including actions such as pointing out a person' at an identification parade and *Public Prosecutor v Siew Sung* [1966] 1 MLJ 145 where HT Ong Ag CJ (as he then was) held that even opening of a pin-table machine with a key by an accused at a police station amounted to the making of a statement.

I am therefore satisfied that the evidence objected to was misrejected by the learned President being rightly admissible as information leading to discovery under s 27 of the Evidence Act.

The effect of my conclusion regarding this part of the case is that there was prima facie evidence that the appellant - who, be it noted, was in sole charge of the car at the time of his arrest — must have been the person who placed the offending exhibits in the car.

There was also, as a result, prima facie evidence that the appellant had exclusive custody or control of the envelopes in the car which contained the offending exhibits. This would be sufficient to attract the operation of the presumptions contained in s 37(d) and (da) of the Act which respectively provides as follows …

[48] Thus, we hold that actions such as pointing or nodding or handing over physically an item in response to a question or request are statements within the

contemplation of s 37A of the Act or is tantamount to information received from a person accused of any offence in the custody of a police officer under s 27(1) of the Evidence Act 1950 depending upon the circumstances of the case. In the instant appeal, we are of the view that the action of the appellant in picking up the said biscuit tin which contained the dangerous drugs in question is a statement within the contemplation of s 37A of the Act. In relation to this, we hold that based on the evidence adduced, that statement is admissible as there is nothing to show that it was caused by any inducement, threat or promise. The appellant, although under arrest, was not handcuffed at that material time. There is nothing to show that he was forced to pick up the said biscuit tin and hand it over to SP4. SP4's evidence on this was not even seriously challenged during the prosecution's case.

[49] We would also hold that the contemporaneous conduct of the appellant in running away when SP4 and SP6 identified themselves as police officers is relevant and admissible by virtue of s 8 of the Evidence Act 1950 under the circumstances of this instant appeal. In relation to this, we would refer to *Pendakwa Raya v Tan Kim Piow* [2006] 5 MLJ 409, a decision of this court. The facts of that case as elucidated by Gopal Sri Ram, JCA in his delivering the judgment of the court is as follows (p 412):

> On 30 June 1997, at about 12.15pm PW10 (Inspector Yusof Abdul) acting on information received by him raided the first floor of premises No 303 Jalan Seng Meng Lee in Seremban. He was accompanied by a team of six other police personnel. He knocked on the door. It was opened by the accused. PW10 then identified himself as a police officer. At that point, the accused made a sudden attempt to close the door. Nevertheless, PW10 and his team managed to force their way in. The accused then tried to run into the house. But he was apprehended. The accused then led PW10 to a room on the first floor. There were three beds in that room. Two male Chinese were sprawled, one on each of two beds. They appeared to be asleep. The third bed was empty. PW10 woke them. They were startled.
>
> There was a cupboard in the room. In it was a black plastic bag inside which was a red plastic bag. From this PW10 removed a package which contained a substance that he suspected to be a dangerous drug. The substance he recovered was, upon subsequent chemical examination, found to be 442.9g of cannabis. The accused and the other two occupants (PW5 and PW6) were arrested. PW5 and PW6 were released and later gave evidence at the accused's trial.

[50] On the act of the accused in the case referred to above taking flight when confronted by the police raiding party, Gopal Sri Ram JCA said (at p 413):

> This contemporaneous conduct of the accused is relevant and admissible by virtue of s 8 of the Evidence Act 1950. We are aware that in a number of cases it has been said that absconding from the scene is not of itself evidence of guilt. But if you look carefully enough at those cases, you will find that the only real evidence against the accused there was his flight. So you find the editors of *Sarkar's Law of Evidence* (15th Ed) saying this:
>
> > Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case.

In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence. As Thomson CJ said in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual to strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[51] We would mention here that we found no material discrepancies in the evidence of SP4 and SP6 as argued by learned counsel for the appellant. We have ruled that the act of the appellant in response to PW4's request is a statement within the contemplation of s 37A of the Act and hence any observation made by this court in relation to s 27(1) of the Evidence Act 1950 in *Hasamuddin Talena* has no bearing upon the instant appeal.

[52] The next question which we had in the forefront of our minds, this being a rehearing, was whether the learned trial judge was correct in determining that the prosecution had proved its case beyond reasonable doubt on the first charge, ie, the offence of trafficking under s 39B(1)(a) of the Act. In *Pendakwa Raya v Tan Kim Piow* this court held (at p 414) as follows:

> To constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act: mere passive possession is insufficient, see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; *Mohamad Yazri Minhat v Public Prosecutor* [2003] 2 MLJ 241.

[53] In *Ong Ah Chuan v Public Prosecutor*, Lord Diplock in delivering the judgment of the Board said (at p 68):

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and' a person to whom the goods are to be supplied.

[54] In the instant appeal before us, the facts clearly showed that when SP4 and SP6 confronted the appellant at the rubbish dump he was standing alone next to the said biscuit tin. No one else was present other than the appellant, SP4 and SP6. When the appellant took flight and was arrested by SP6, he was brought back to the same spot where he had earlier been standing. After the caution was administered to him, SP4 asked him to hand over any prohibited item in his custody or control. In response he picked up the said biscuit tin and handed it to SP4 who upon inspection found that it contained the said dangerous drugs. We find that this

evidence clearly established that the appellant was in custody and control of the said dangerous drugs giving rise to the presumption under s 37(d) of the Act. Section 37 provides in all proceedings under the Act or any regulation made thereunder:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[55] The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had knowledge. But to constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act as has been decided in *Muhammad bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (see also *Pendakwa Raya v Tan Tatt Eek* [2005] 2 MLJ 685).

[56] For the reasons above, my brother Denis Ong JCA and myself set aside the conviction and sentence on the first charge of trafficking under s 39B(2) of the Act and convicted the appellant on a substituted charge of possession under s 12(2) of the Act read together with s 39A(2) of the same and sentenced him to 14 years imprisonment and imposed 10 strokes. As discussed earlier, we affirmed the conviction and sentence imposed on the second charge of possession and ordered that the sentences are to run concurrently to take effect from the date of arrest.

[57] My brother Denis Ong JCA has perused this judgment in draft and has expressed his concurrence with the reasons herein.

James Foong JCA (delivering dissenting judgment):

INTRODUCTION

[58] The appellant was charged with two offences:

First offence

> Bahawa kamu pada 11 Jun 2001, jam lebih kurang 2.15 petang di tempat pembuangan sampah, Jinjang Utara, dalam daerah Sentul, dalam Wilayah Persekutuan Kuala Lumpur, telah mengedar dadah berbahaya iaitu 20.1g monoacetylmorphines, oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 39(B)(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39(B)2 Akta yang sama

Second offence

> Bahawa kamu pada 11 Jun 2001, jam lebih kurang 2.15 petang di tempat pembuangan sampah, Jinjang Utara, dalam daerah Sentul, dalam Wilayah Persekutuan Kuala Lumpur,

telah memiliki dadah berbahaya iaitu 9.5g campuran heroin dan monoacetylmorphines (7.1 gram heroin dan 2.4g monoacetylmorphines), oleh yang demikian kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39A(2) Akta yang sama.

[59] He was found guilty by the High Court in Kuala Lumpur on both charges. On the first charge he was sentenced to death. On the second charge, he was sentenced to seven years imprisonment with 10 strokes of rotan. Dissatisfied with this decision, he appealed to us.

FACTS OF THE CASE

[60] The facts of this case are these: On 11 June 2001, at about 2.15pm, one Chief Inspector Haslah ('SP4') acting on information received, together with his team of police officers from the Narcotics Department of Kuala Lumpur, conducted an operation at a rubbish dump in Jinjang Utara, Sentul, Kuala Lumpur. During this operation, she saw the appellant standing near a tin-can. She approached the appellant with one of her men, SP6. When she identified herself as a police officer, the appellant ran away in fright. But he was apprehended by SP6 and was brought back to the spot where he originally stood. He was then arrested. SP4 then asked the appellant whether he understood Bahasa Malaysia. After the appellant had nodded his head, SP4 administered the caution under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('DDA') to him. SP4 then said that 'Saya minta orang kena tuduh serahkan apa-apa barang salah dalam simpanan dan kawalan beliau'. At this request, the appellant picked up the tin-can which was beside him and handed it over to SP4. Inside were: (a) a bundle of 10 plastic bags each of them contained 10 packets of suspected illicit drugs, making a total of 100 plastic packets in this bundle; (b) a bundle of five plastic bags each containing 10 packets of suspected illicit drugs, making a total number of 50 packets in this bundle. The contents of these packets were sent to the Chemistry Department for analysis. They were found to be:

(a) 20.1g of monoacetylmorphines from the 100 packets in the first bundle;

(b) 2.4g of monoacetylmorphines and 7.1g heroin from the 50 packets in the second bundle.

APPROACH TAKEN BY THE TRIAL JUDGE

[61] When evidence was tendered to prove that the appellant picked up the tin-can and handed it over to SP4, the appellant's counsel objected and demanded a voir dire to determine its admissibility. This demand was acceded to by the trial judge. But at the conclusion of this exercise, the trial judge decided that the said conduct of the appellant did not amount to a statement within the meaning of s 37A(1) DDA. He felt that the trial-within-a-trial should not have been conducted. Nevertheless, he admitted this piece of evidence as part of the testimony of SP4. And towards the end of the prosecution's case for the prosecution, he ruled:

Setelah menimbangkan kesemua fakta-fakta tersebut secara keseluruhannya, saya membuat kesimpulan fakta bahawa orang kena tuduh mempunyai custody dan control ke atas dadah berbahaya iaitu 20.1g monoacetylmorphines dalam 100 peket plastik [P9(A1–P9A100)].

> Saya juga membuat kesimpulan bahawa orang kena tuduh mempunyai pengetahuan tentang dadah berbahaya tersebut. Oleh itu saya telah membuat kesimpulan fakta bahawa orang kena tuduh memiliki (in possession) dadah berbahaya dalam 100 peket-peket plastik kecil [P9(A1–A100)] dalam P12. Memandangkan bahawa jumlah berat bersih monoacetylmorphines dalam P9(A1–A100) adalah 20.1g, saya memutuskan bahawa presumption di bawah s 37(da)(iii), Akta Dadah Berbahaya 1952 terpakai terhadap orang kena tuduh. Orang kena tuduh adalah dianggap (sehingga dibuktikan sebaliknya) mengedar 20.1g monoacetylmorphines. Berdasarkan kepada fakta-fakta yang tersebut juga saya membuat kesimpulan fakta bahawa orang kena tuduh mempunyai custody dan control dadah berbahaya dalam 50 peket plastik [P9(A101–A150)] dalam P12. Saya juga membuat kesimpulan bahawa orang kena tuduh mempunyai pengetahuan tentang dadah berbahaya tersebut. Oleh itu saya membuat kesimpulan fakta bahawa orang kena tuduh memiliki (in possession) dadah berbahaya (iaitu, campuran 7.1g heroin dan 2.4g monocetylmorphines).

GROUNDS OF APPEAL

Under what provision of the law was the conduct of the appellant in picking up the tin-can and handing it over to SP4 received in evidence?

[62] Worried that this court may not agree with the views of the trial judge that the said conduct of the appellant in picking up the tin-can and handing it over to the SP4 was not a statement within the meaning of s 37A(1) DDA, counsel for the appellant fervently urged us to uphold the views of the learned trial Judge on this point. But much to his surprise, the learned deputy prosecutor conceded that the opinion of the learned trial judge was correct. She even went further to explain that Parliament had in 1976 amended a similar provision as s 37A(1) DDA in the s 113 of the Criminal Procedure Code by adding the word 'conduct' to cover such a situation as in this instant case. But no attempt was made by Parliament to proceed with a similar amendment to s 37A(1) DDA. Therefore, the conduct of the appellant in picking up the tin-can and handing it over to SP4 cannot be considered as a statement under s 37A(1) DDA that required a caution to be administered before it could be admitted in evidence.

[63] I am in full agreement with the ruling of the trial judge on this point. He was correct in holding that the conduct of the appellant was not a statement within s 37A(1) DDA and therefore the voir dire proceeding was unnecessary. But he did not proceed further to elaborate why and by which provision of the evidential law this conduct of the appellant was admitted in evidence. Mr Gobind Singh Deo, counsel for the appellant, argued that it should not be received under s 27 of the Evidence Act 1950 which says:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[64] He stressed that if the said conduct of the appellant was to be admitted under s 27 of the Evidence Act 1950, the prosecution must prove the exact question asked

from which the information was derived. He cited the case of *Public Prosecutor v Khoo Boo Hock & Anor* [1990] 2 CLJ 716 in support.

[65] The learned Deputy Public Prosecutor on the other hand, submitted that the trial judge had never contemplated admitting this piece of evidence under s 27 of the Evidence Act 1950. This is reflected by the total absence of any reference to this provision in his grounds of judgment. In her opinion, this piece of evidence was admitted under s 8(2) of the Evidence Act 1950 which provides:

> The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[66] I tend to share her views on this. First, there is neither a direct or indirect reference by the trial judge in his grounds of judgment to indicate that he admitted this piece of evidence under s 27 of the Evidence Act 1950. If he had done so, I would have expected him to make a positive finding in his grounds of judgment on the information received that lead to the discovery of the fact disposed of. And in order to arrive at such a decision he would have scrutinized the question asked by the police officer that led to the information disclosed, see *Public Prosecutor v Khoo Boo Hock & Anor.* This was necessary to ensure that the information received was associated with the question asked. As there is no indication of such precautionary exercise undertaken by the trial judge, I am of the view that he did not receive this piece of evidence by way of s 27 of the Evidence Act 1950.

[67] Second, s 8(2) of the Evidence Act 1950 permits the admission of evidence of the conduct of the appellant when it is in reference to a relevant fact in issue, and here it is whether the said conduct of the appellant can imply that the appellant was in possession of the illicit drugs contained in the tin-can.

[68] But having correctly admitted this piece of evidence, it was still necessary for the prosecution to prove to the satisfaction of the court that the appellant was in possession of the illicit drugs contained in the tin-can. This would include proving that he had knowledge that its contents were the illicit drugs. It is my view that the conduct of the appellant in picking up the tin-can and handing it over to SP4 alone did not in any way infer that the appellant was in possession of the illicit drugs. This conduct had to be considered together with the question posed by SP4 to him since it arose from the question asked. They were inter-related. Let me first consider the question posed by SP4 to the appellant to hand over 'apa-apa barang salah' which he had under this custody and control. But 'apa-apa barang salah' could mean anything that is 'salah'. It may not necessary be in reference to the illicit drugs. It could be anything which is unlawful, such as contraband, pirated or stolen goods. Without specially enquiring about drugs in the question asked then it cannot be conclusively inferred from the appellant's conduct in picking up the tin-can and handing it over to SP4 that he knew that the contents in the tin-can were the illicit drugs. It could be anything which the appellant believed to the unlawful. When more

A than one inference can be drawn from the response to the question asked then the one which is more favourable to the appellant must be adopted, see *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105 at p 108 and accepted by the Federal Court in *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685. Therefore, in the circumstances of this case, I find that the conduct of the appellant in response to the
B question posed by SP4 to him did not imply that he had knowledge that inside the tin-can which he picked and handed to SP4 contained the illicit drugs for which he was charged to be in possession of.

The act of running away

C **[69]** The next pertinent piece of evidence found by the trial judge which was adverse to the appellant was his running away from the scene of the crime when confronted by the police. But does this action alone provide the only inference that the appellant knew the illicit drugs were in the tin can? I do not think so and my view is similar to that as illustrated in *Abdullah Zawawi bin Yusoff v Public Prosecutor*
D [1993] 3 MLJ 1 where the Supreme Court declares at p 1:

> The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of pure panic. An innocent man faced
E with the prospect of arrest on a capital charge might foolishly react in that way.

[70] Faced with a possible alternative inference, I would have to accept the one which is more favourable to the appellant (see *Tai Chai Keh v Public Prosecutor*) and in this case it was the possibility that the appellant reacted in panic in the face of
F being arrested for possession of something unlawful other than the illicit drugs.

CONCLUSION

[71] As possession of the said drugs has not being positively proved, I find that the
G trial judge has misdirected himself in calling for the appellant to enter his defence after the prosecution's case. In view of this misdirection, I would allow this appeal and set aside both convictions and sentences on both the charges.

Conviction and sentence on first charge of trafficking set aside. Conviction substituted
H *to possession charge and sentence of 14 years' imprisonment and ten strokes imposed.*

Reported by Sally Kee

I